Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Idaho

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 10 of the Stock Raising Homestead Act, ch. 9, 39 Stat. 862, 865, delegated to the President authority to withdraw lands from the public domain "containing water holes or other bodies of water needed or used by the public for water purposes" under the Pickett Act of June 25, 1910, ch. 421, 36 Stat. 847. Under the claimed authority of section 10 of the Stock Raising Homestead Act and section 1 of the Pickett Act, President Coolidge issued an Executive Order entitled "Public Water Reserve No. 107," which withdrew from the public domain certain unreserved public lands containing a spring or water hole. The question presented by this petition is as follows:

By enactment of section 10 of the Stock Raising Homestead Act, did Congress intend to give authority to the President to reserve for use by the United States the water as well as the public land containing water holes or other bodies of water needed or used by the public for water purposes?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, J. R. Simplot Co.; Lemhi Irrigation Co.; Dave Nelson; Lola Coates; San Felipe Ranch; Harry R. Bass; Ted S. Blackstock; Richard Brandau; William J. Brockman; Michael F. Hanley, IV; Jerry L. Hoagland; Thomas Ballman Hook; Tim Lowry; Bill Lowry; Paul Nettleton; R. J. Smith; Wiley F. Smith; Mitchell D. Sorensen; Robert Thomas; and Young Harvey Walker participated as respondents in the Idaho Supreme Court.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General, on behalf of the State of Idaho, petitions for a writ of certiorari to review the judgment of the Supreme Court of Idaho in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Idaho is reported at ___ Idaho ___, 959 P.2d 449 (Idaho 1998), and is reprinted in Appendix A hereto, (App. 1, *infra*). The order denying a petition for rehearing is unreported. It is reprinted in Appendix C hereto, (App. 28, *infra*). The memorandum decision of the District Court of the Fifth Judicial District for Twin Falls County, Idaho is unreported. It is reprinted in Appendix B hereto, (App. 13, *infra*).

JURISDICTION

The judgment of the Idaho Supreme Court was entered on July 29, 1998, following denial of a petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1994).

STATUTORY PROVISIONS INVOLVED

The Pickett Act of June 25, 1910, ch. 421, 36 Stat. 847, also known as the General Withdrawal Act, provides in relevant part:

> § 1. That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

43 U.S.C. § 141 (repealed 1976).

The Stock Raising Homestead Act of December 29, 1916 (the "SRHA"), ch. 9, 39 Stat. 862, provides in relevant part:

> § 10. That lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but may be reserved under the provisions of the Act of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe. . . .

43 U.S.C. § 300 (repealed 1976).

STATEMENT OF THE CASE

i. Introduction

The United States filed over 11,000 federal reserved water right claims in the Snake River Basin Adjudication

based on Public Water Reserve 107 (PWR 107), an Executive Order entered on April 17, 1926. The claimed purpose of use was stockwater. The dispute concerns whether Public Water Reserve 107 is a valid basis for a federal reserved water right in the Snake River Basin Adjudication.[1]

The State of Idaho commenced the Snake River Basin Adjudication in 1987, a general adjudication of all water rights acquired under state law and reserved under federal law. The United States was joined as a party in accordance with the McCarran Amendment, 43 U.S.C. § 666 (1994). Pursuant to special statutory procedures enacted to process the more than 170,000 claimed water rights, all water users, including the United States, were required to file a separate notice of claim for each claimed water right. In addition, the Idaho Supreme Court delegated authority to the Idaho District Court to establish further procedures for the processing of the notices of claim.

The Idaho District Court created a procedure to designate and resolve Basin-Wide Issues – issues that materially affect a large number of claimants. The Idaho District Court allows any claimant to file a motion to designate an issue as a Basin-Wide Issue. After opportunity for response by other claimants and hearing, the Idaho District Court determines whether to designate a

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[1] The lower courts did not address, and this appeal does not raise whether the United States followed proper procedures in reserving the lands containing 11,000 PWR 107 claims for stockwater rights.

Basin-Wide Issue and, if so, establishes a briefing and hearing schedule for a decision on the merits.

ii. Proceedings Before the Idaho District Court.

Two water users filed a motion to designate the validity of Public Water Reserve No. 107 as a Basin-Wide Issue. The United States asked for designation of the validity of PWR 107 as a Basin-Wide Issue at the hearing on the motion. R Vol. I, p. 76. The Idaho District Court then designated the following legal issue as Basin-Wide Issue No. 9:

> Whether Public Water Reserve 107 is a valid basis for a federal reserved water right.

R. Vol. I, p. 77.

The United States argued that PWR 107 is an express reservation of water or, in the alternative, that PWR 107 is an express reservation of land with an implied reservation of water under the doctrine first announced in *Winters v. United States*, 207 U.S. 564 (1908). The State of Idaho and other objectors responded with two points, among others. First, PWR 107 did not constitute an express reservation of water. Second, the purpose of PWR 107, as established by the Stock Raising Homestead Act, ch. 9, 39 Stat. 862 (1916) (hereinafter "SRHA"), was to prevent homesteaders from controlling "a large territory by locating as a homestead the only available water supply for stock in that vicinity." H.R. Rep. No. 35, 64th Cong. 1st Sess. 18 (1916). Congress intended to accomplish this purpose by preventing the private acquisition or enclosure of land containing the spring and not through the

reservation of water "needed or used by the public for water purposes." 39 Stat. 865.

The Idaho District Court concluded that PWR 107 was not a valid basis for a federal reserved water right and stated its conclusions as follows:

> PWR 107 was issued to prevent control of water sources by individual homesteaders and subsequent control of adjacent land. Its express purpose was to reserve the land immediately surrounding water sources to ensure that water would remain available for public use and appropriation. . . . Concomitantly, the homesteaders would appropriate the water so protected and place it to private use.

Appendix at App. 17. The Idaho District Court cited an opinion of the Assistant Secretary of the Interior that concluded that the private appropriation of water from public water reserves was not precluded by the reservation. Appendix at App. 10, n. 4. Thus, the Idaho District Court concluded that no express or implied reserved water right existed for PWR 107. Rather, Congress' purpose in enacting the SRHA was to promote the settlement of the West by making the water found within public water reserves available for private appropriation. Appendix at App. 17.

iii. Proceedings Before the Idaho Supreme Court.

The United States appealed, and the Idaho Supreme Court reversed the Idaho District Court with only a cursory discussion of the issues. First, it characterized PWR 107 as "an express intention by Congress that reserves a

water right in the United States." Appendix at App. 9. It later concluded:

> The purpose of PWR 107 was to prevent the monopolization by private individuals of springs and waterholes on public lands needed for stockwatering. Without the reserved water right for such springs and waterholes the purpose of PWR 107 would be entirely defeated because Taylor Grazing permittees would not have water needed for stockwatering purposes.

Appendix at App. 10. The Idaho Supreme Court failed to even discuss the fact that the Assistant Secretary of the Interior had concluded in *State of Utah*, 45 I.D. 551 (1916), that a member of the public could appropriate water under state law from a public water reserve, a conclusion inconsistent with its decision. Moreover, the court failed to recognize that the Taylor Grazing Act was not enacted into law until eight years after issuance of PWR 107.

REASONS FOR GRANTING THE PETITION

Federal lands "form brightly colored swaths across the map" of Idaho as well as the other Western states. *United States v. New Mexico*, 438 U.S. 696, 699 (1978). The federal government, for example, owns over 65 percent of the land in Idaho. In the arid West, "federal reservations inescapably vie with other public and private claims for the limited quantities [of water] to be found in the rivers and streams." *Id.* The sheer magnitude of the federal landholdings in the West exacerbates the competition for water. *Id.* Thus, as this Court has repeatedly announced,

Congress has expressly deferred to state water law for the allocation of these scarce water supplies. 438 U.S. at 702.

In a decision in direct conflict with this Court's doctrine, the Idaho Supreme Court held that Congress intended through enactment of the Stock Raising Homestead Act to reserve water for stockwatering on federal lands and for the United States to allocate this water for use by stockmen. The decision creates a vast web of potentially 11,000 new federal reserved water rights on the 11.9 million acres of public domain land in Idaho that will displace thousands of water rights established by private individuals under Idaho law. These water users will now be required to seek permission from the federal government to use the water on public water reserves. Never before has this Court sanctioned a federal system of allocation of water. Yet, that is the effect of the Idaho Supreme Court's misapplication of this Court's doctrine.

I. The Idaho Supreme Court's PWR 107 Decision is in Direct Conflict with the Law Governing Federal Reserved Water Rights as Established by this Court in *United States v. New Mexico*, 438 U.S. 696 (1978).

A. Introduction

The United States argued in this case that PWR 107 constitutes an express reserved water right, and the Idaho Supreme Court agreed. The Idaho Supreme Court stated:

> [W]e conclude that **PWR 107 evidences an express intention by Congress that reserves a water right in the United States.**
>
> . . . .

> In the present case, the United States has limited its claim for a reserved water right to stock water consumption. The United States asserts that the purpose of PWR 107 is to reserve water for public use and appropriation as a source for permittees under the Taylor Grazing Act. The United States persuasively argues that such a reservation of stock water is needed in order to ensure the perpetual use of the water for stockwatering purposes by whichever member of the public happens at any time to have the grazing permit for the lands containing the relevant springs and waterholes.

Appendix at App. 9 (emphasis added). There is much wrong with these superficial conclusions.[2] First, these conclusions are inconsistent with the legislative and administrative history upon which PWR 107 is based. Second, these conclusions directly conflict with *United States v. New Mexico* in several respects.

B. The Purpose of PWR 107 was to Make Water on the Reserved Land Available for Private Appropriation.

PWR 107 was issued under the Pickett Act of June 25, 1910, ch. 421, 36 Stat. 847, and section 10 of the Stock Raising Homestead Act of December 29, 1916, ch. 9, 39

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[2] For example, the Taylor Grazing Act of June 28, 1934, ch. 865, 48 Stat. 1269, was only an optimistic gleam in a federal bureaucrat's eye in 1926. President Coolidge signed PWR 107 over eight years prior to the enactment of the Taylor Grazing Act in 1934, and the SRHA preceded the Taylor Grazing Act by over seventeen years.

Stat. 862, 865. Thus, a brief review of both acts is necessary to understand the purposes for the creation of PWR 107. This review refutes the Idaho Supreme Court's finding that Congress intended by enactment of the SRHA to reserve water for stockwatering purposes. Rather, section 10 of the SRHA was for the express purpose of ensuring public access to and use of water on these public water reserve lands pursuant to state law.

1. The Creation of Public Water Reserves Began with the Pickett Act.

The Pickett Act authorized the President to "temporarily withdraw from settlement, . . . any of the public lands . . . and reserve the same for . . . other public purposes. . . . " 36 Stat. 847. The President began entering executive orders for public water reserves in 1912. Exhibit 3. As the name implies, the lands were reserved so that the water would be available for public use.

The first such public water reserve in Idaho was Public Water Reserve 28 entered on May 31, 1915; Exhibit 4. The President had withdrawn 182,653 acres as public water reserves under the general authority of the Pickett Act by June 30, 1915. H.R. Rep. No. 35, 64th Cong. 1st Sess. 10 (1916); Exhibit 15.

2. Congress Endorsed the Creation of Public Water Reserves by the Enactment of the Stock Raising Homestead Act.

Congressman Ferris introduced H.R. 407, 64th Cong. 1st Sess. 1915), to provide for stock raising homesteads.

53 Cong. Rec. 23 (1915). This bill was to become the SRHA. The bill was the "result of the joint efforts of the committee [Public Lands Committee of the House of Representatives] and the Interior Department." H.R. Rep. No. 35, 64th Cong. 1st Sess. 13 (1916); Exhibit 15. Section 10 of H.R. 407 expressly authorized the President to reserve land "**containing water holes or other bodies of water needed or used by the public for watering purposes.**"[3] 39 Stat. 865 (emphasis added).

The congressional debate regarding H.R. 407 emphasized that the purpose of the legislation was to settle the West. *Id*. The major change proposed by H.R. 407 was to increase the size of a homestead to 640 acres in order to provide sufficient size for a family to make a living on the poorer quality lands remaining after fifty years of homesteading. In this respect, H.R. 407 was modeled after earlier legislation that had authorized larger homesteads in the state of Nebraska.[4] 53 Cong. Rec. 1171-1173 (1916) (statement of Congressman Kinkaid). Simply put, the purpose of H.R. 407 was to carry out "the time-honored policy of this Government to use the public domain as far as possible to furnish homes for the citizens of our country." H.R. Rep. No. 35, 64th Cong. 1st Sess. 14-15 (1916).

The House of Representatives passed H.R. 407 on January 18, 1916. 53 Cong. Rec. 1234 (1916). The Senate

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[3] The provision regarding water holes was originally in section 11. H.R. Rep. No. 35, 64th Cong. 18 (1916). The water holes provision became section 10 when section 9 was deleted in conference. S. Doc. No. 641, 64th Cong. 2d Sess. 1 (1916).

[4] This earlier act is known as the Kinkaid Act of April 28, 1904, ch. 1801, 33 Stat. 547.

passed H.R. 407 on September 8, 1916. 53 Cong. Rec. 14131 (1916). However, the first session of the 64th Congress ended before a conference committee could be appointed to resolve differences between the House and Senate versions of the bill.

After adjournment of the first session, the Department of the Interior issued its decision in *State of Utah*, 45 I.D. 551 (1916), which related to a public water reserve created solely under the authority of the Pickett Act. In that decision, the Assistant Secretary of the Interior concluded:

> There is in the withdrawal of these lands [for a public water reserve] nothing which prevents any person filing such an appropriation [of water] under the laws of Utah at any time. If, however, the appropriator shall seek to fence the land, or to erect structures thereon which would prevent the public from continued free access to all parts of it, he would be exceeding the rights which could be granted him under State law. . . .

45 I.D. at 554. Because of the timing of the issuance of this opinion, it was not mentioned in the Committee Reports. However, the conclusion of the opinion is consistent with the plain language of section 10. Moreover, since the Department of the Interior was a proponent of the SRHA, it would have advised Congress if it thought H.R. 407 would lead to a result different from *State of Utah*.

The second session of the 64th Congress convened on December 4, 1916, and a conference committee began deliberations. 54 Cong. Rec. 4 (1916). Even though the

conference committee recommended amendments to section 10 after consultation with the Department of the Interior, no amendments were offered concerning the congressional authorization of public water reserves. 54 Cong. Rec. 642 (1916) (statement of Senator Thomas). Thus, throughout the congressional debate of H.R. 407, the express purpose of section 10 was to "authorize the Secretary of the Interior to withdraw from entry and hold open for the general use of the public important water holes, springs and other bodies of water . . . ." H.R. Rep. No. 35, 64th Cong., 1st Sess. 18 (1916). This purpose was later embodied in Department of the Interior regulations.

3. The Department of the Interior Confirmed Its Earlier Interpretation Regarding Public Water Reserves in 1925.

In 1925, the Department of the Interior adopted regulations in *Circular No. 1028, Use of Lands Withdrawn As Public Water Reserves*, 51 I.D. 186 (1925), which were based on its decision in *State of Utah* and on the interpretation of the Stock Raising Homestead Act the Department advanced in Congress. That regulation provides, in part, as follows:

> 8. Each permit shall contain, beside those necessary in individual cases, the following conditions:
>
> A. **That the right to appropriate the waters of the State to the uses contemplated shall be obtained within one year from and after the issuance of the permit and the permittee shall file a certificate to that effect issued by the proper State authority.**

Id. 51 I.D. at 187 (emphasis added). Those regulations were later incorporated into the Code of Federal Regulations and remained in the code through 1976. 43 C.F.R. 292.10 through 292.17 (1938); 43 C.F.R. 2311.3 (1976).

4. The Department of the Interior Changed Its Position Regarding Public Water Reserves.

Notwithstanding these regulations, the position of the Solicitor regarding the effect of PWR 107 on the private appropriation of water changed after the filing of the United States' brief in *Nebraska v. Wyoming,* 325 U.S. 589 (1945). The United States claimed in that litigation that it owned all the unappropriated water in the West that had not been previously acquired for private use. *Id.* at 611. In *Jack A. Medd,* 60 I.D. 83 (1947), the Solicitor followed the lead of the Department of Justice and concluded that the private appropriation of water under applicable state law from a spring within a public water reserve was invalid. The Solicitor stated:

> With regard to the question of the ownership of the unappropriated nonnavigable waters on the public domain, this Department adheres to the position that was taken by the executive branch of the Government in the case of *Nebraska v. Wyoming,* 325 U.S. 589, 611-616 (1945).

60 I.D. at 100; Exhibit 40. Since that time, the Solicitor has taken the position that the private appropriation of water under state law from springs within a public water reserve is not valid. *Compliance by the Department with State Laws Concerning Water Rights,* M-33969 (1950); Exhibit 30.

Paradoxically, the Department of the Interior never revised its regulations to reflect this change in legal position. Thus, an inconsistency exists in the position of the United States. After 1947, the Solicitor argued that a private appropriation of water under state law from a PWR 107 water source was not permissible. On the other hand, applicable regulations of the Department of the Interior in existence through 1976 required that a person appropriate water under state law to use water from a water source within a public water reserve.

5. Section 10 Expressly Provides for Public Use of Waters within Public Water Reserves.

A plain reading of section 10 demonstrates that Congress' intent was to make water on the reserved lands available for public use – not to reserve water for stockwatering. Moreover, the legislative history and contemporaneous history confirm the plain meaning of section 10. Congress undoubtedly had this contemporaneous executive branch interpretation about the effect of public water reserves in mind when it considered H.R. 407 in conference.

This Court has accorded "great weight to a departmental construction of its own enabling legislation, especially a contemporaneous construction. . . . " *Zuber v. Allen*, 396 U.S. 168, 192 (1969). Here, the Department of the Interior participated in the drafting of the SRHA and made known its views to Congress regarding the conference report on H.R. 407. 54 Cong. Rec. 642 (1916) (statement of Senator Thomas). Any ambiguity about the impact of section 10 on the private appropriation of water

from public water reserves should be resolved in favor of that administrative construction contained in *Circular No. 1028*. 396 U.S. at 192. The later position of the United States, reflected in *Nebraska v. Wyoming*, is not entitled to any weight since that opinion occurred many years after the enactment of the SRHA and since Congress did not consider that opinion when it enacted the SRHA.

In short, the language and history of the statutes upon which PWR 107 is based rebut any assertion that Congress intended to authorize or that the President did in fact reserve a water right under PWR 107 for stock-watering purposes. The superficial analysis of the Idaho Supreme Court completely ignored this history. It is therefore clearly erroneous and should be summarily reversed.

C. The Idaho Supreme Court Decision Conflicts with *United States v. New Mexico* Because It Concludes that PWR 107 is an Express Reserved Water Right.

The federal-state relationship regarding the use of water found in the "Great American Desert" has a long tumultuous history.[5] In *California v. United States*, 438 U.S. 645 (1978), this Court carefully reviewed the history of that relationship by beginning its review with the first federal statute addressing the use of water on the public domain – the Mining Act of 1866, ch. 262, 14 Stat. 251 and

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[5] This Court has long referred to the arid lands west of the 100th meridian of longitude as the "Great American Desert." *See California v. United States*, 438 U.S. 645, 648 (1978).

continued its analysis through the Reclamation Act of 1902, ch. 1093, 32 Stat. 388. The Court recognized that the consistent congressional resolution of conflicts regarding the use of water in the arid West was a policy of congressional deference to state water law. *California v. United States*, 438 U.S. at 653. In the companion decision in *United States v. New Mexico*, 438 U.S. 696, 702, n. 5 (1978), this Court noted that Senator Kuchel had collected a list of "37 statutes in which Congress has expressly recognized the importance of deferring to state water law. . . . " Indeed, the Court noted that "Congress has seldom expressly reserved water for use on these withdrawn lands." 438 U.S. at 699.

Despite the express purpose of section 10 to ensure that water would remain available for public use pursuant to state law, the Idaho Supreme Court embarked upon an analysis of PWR 107 that conflicts with the reserved water rights doctrine as articulated by this Court in *United States v. New Mexico*. The Idaho Supreme Court did not "carefully examine" the "asserted water right and the specific purposes for which the land was reserved. . . . " *Id.* at 700. Rather, the court ignored the express language of the SRHA and the legislative history and contemporaneous administrative interpretations. The court found persuasive an argument about a need for water associated with the Taylor Grazing Act, which was enacted many years after the SRHA.[6] Moreover, the court utterly failed to evaluate the purpose of this legislation in

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[6] The Taylor Grazing Act of June 28, 1934, ch. 865, 48 Stat. 1269, was enacted over seventeen years after enactment of the SRHA.

light of the congressional policy of deference to state water law as required by *United States v. New Mexico.*

The use of water found on the public domain is an important issue throughout the West. In many instances, the only water supply for the surrounding population is from a source on the public domain. Thus, at the turn of the century, Congress passed several statutes that authorized the President to reserve certain lands containing water supplies necessary to the settlement of the West. Among those statutes were the Organic Administration Act of 1897, ch. 2, 30 Stat. 34, and the Stock Raising Homestead Act, ch. 9, 39 Stat. 862 ("SRHA"). The two acts have striking parallels. The Organic Act authorized the President to reserve forest land for the purpose of ensuring a continuous flow of water for settlers homesteading surrounding lands. 30 Stat. 35. The SRHA authorized the President to reserve "lands containing water holes or other bodies of water needed or used by the public for watering purposes." 39 Stat. 865. Thus, both acts promoted settlement of the West.

As recognized by this Court in *United States v. New Mexico,* Congress, in authorizing the Organic Act, did not foresee any need for the federal government to allocate water among the settlers but, rather, deferred to state law the task of allocating these waters. 438 U.S. at 717, n. 24. In summarily rejecting the United States' claim for a stockwatering reserved water right for national forests, this Court stated:

> The United States contends that, since Congress clearly foresaw stockwatering on national forests, reserved rights must be recognized for this purpose. New Mexico courts disagreed and held

> that any stockwatering rights must be allocated under state law to individual stockwaterers. We agree.
>
> While Congress intended the national forests to be put to a variety of uses, including stockwatering . . . **stockwatering was not itself a direct purpose of reserving the land**. . . . But Congress intended the water supply . . . to be allocated among private appropriators under state law. There is no indication in the legislative histories of any of the forest acts that Congress foresaw any need for the Forest Service to allocate water for stockwatering purposes, a task to which state law was well suited.

438 U.S. 717 (emphasis added) (citation omitted) (footnotes omitted). The claim for stockwatering under PWR 107 based on the SRHA should be equally rejected. There is no intent expressed on the face of the statute to reserve water for livestock. While most certainly livestock was one of the intended uses, stockwatering was not itself a "direct purpose of reserving the land" under the SRHA. Rather, the express purpose of the SRHA was to carry out "the time-honored policy of this Government to use the public domain as far as possible to furnish homes for the citizens of our country." H.R. Rep. No. 35, 64th Cong. 1st Sess. 14-15 (1916). Section 10 furthered this policy by holding "open for the general use of the public, important water holes, springs, and other bodies of water" on the public domain. *Id.* at 18.

If the Idaho Supreme Court's decision becomes final, a most anomalous result occurs. The United States Bureau of Land Management will be allocating the water on the public water reserves for private stockwatering use. On

adjacent forest reservations, state law will be allocating the water for private stockwatering use in accordance with *United States v. New Mexico*. The purposes of the two acts do not justify such an anomalous result.

D. The Purpose for Creation of Public Water Reserve No. 107 would not be Entirely Defeated in the Absence of an Implied Federal Reserved Water Right.

The Idaho Supreme Court, in the alternative, also held that PWR 107 constituted an implied reserved water right as follows:

> The purpose of PWR 107 was to prevent monopolization by private individuals of springs and waterholes on public lands for stockwatering. Without the reserved water right for such springs and waterholes the purpose of PWR 107 would be entirely defeated because Taylor Grazing permittees would not have water needed for stockwatering purposes.

Appendix at App. 10. The decision resolves whether a federal reserved water right exists through an analytical approach inconsistent with rulings of this Court.

The implied-reservation-of-water doctrine is itself a canon of construction which is applied in the absence of any definitive congressional or executive statement about the reservation of water for a particular federal reservation. This canon of construction is an aid in divining congressional or executive intent regarding the reservation of water where Congress or the executive was silent on the issue. *Winters*, 207 U.S. at 576-577. Like all other canons of construction, it is not applicable in the face of

congressional or executive intent to the contrary. As earlier stated, the congressional endorsement of public water reserves in section 10 of the SRHA was based on an executive branch interpretation that the existence of a public water reserve did not preclude the private appropriation of water from water sources within the public water reserve. *Supra* at 11. There is nothing in the Act or legislative history to support an inference that stock-watering was a "direct purpose" of the SRHA. Thus, it is unnecessary to resort to the canon of construction regarding implication of a federal reserved water right from the *Winters* case. The intention of Congress and the executive branch is known, and it disclaims any intent to interfere with the private appropriation of water under state law from the water source within a public water reserve. *State of Utah*, 45 I.D. 551, 554 (1916). The Idaho Supreme Court had no basis to imply a federal reserved water right, and its alternative holding to that effect is directly inconsistent with the decision of this Court in *United States v. New Mexico*.

II. The Idaho Supreme Court Decision is Contrary to the Teachings of this Court and Would Establish a Federal System of Allocation of Water.

The United States has long eschewed and with much imagination has bitterly sought to undermine the long-standing policy of Congress to defer to state water law in the allocation of water supplies in the West. It has sought to promote a much larger role for itself – the executive branch. Thus, in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), the United States claimed it owned all the unappropriated water on the public domain. *Id.* 325 U.S. at 611. In

United States v. New Mexico, the United States claimed "that Congress intended the United States to allocate water to certain private users – in this case, cattle ranchers – outside the structure of state water law." 438 U.S. at 717, n. 24. In each case, this Court has summarily rejected the United States' attempt to undermine the congressional policy of deference to state water law.

In this case the United States asserts Congress intended for the Department of the Interior to allocate water to cattle ranchers. The United States found a receptive audience in the Idaho Supreme Court. The court stated:

> **We agree with the United States** and the observation by the Colorado Supreme Court that the purpose of PWR 107 includes a federal reserved water right and **that the United States has the right to administer those water rights.**

Appendix at App. 9 (emphasis added). The court's decision portends a dramatic departure from this Court's doctrine and an undermining of congressional policy.

If the Idaho Supreme Court's decision becomes final, up to 11,000 new federal reserved water rights may be created on the 11.9 million acres of public domain in Idaho. Because of the early priority date for these new federal rights, many existing water rights established under state law will be displaced. The holders of those water rights will be forced to turn to the federal government for water. The United States will have the beginnings of a plenary federal system for control of water on the public domain. This change is inconsistent with 150 years of congressional policy of deferring to allocation of

water pursuant to state law. Thus, the Idaho Supreme Court's decision warrants review by this Court on this ground alone.

III. Review of This Decision or Summary Reversal for Consideration in Light of *United States v. New Mexico* Will Provide Guidance on the Many Other Federal Reserved Water Right Cases Pending in the SRBA and Will Assist Other State Adjudications.

The present case reflects a trend in the West. General adjudications of water rights under the authority of the McCarran Amendment, 43 U.S.C. § 666 (1994), are proceeding at an unprecedented rate. This is in large part due to the ever increasing demands on the limited water supplies. A determination of all rights is an essential first step in effective water management.

The State of Idaho commenced the Snake River Basin Adjudication in 1987. It includes 87% of the geographic area of the State, and various claimants filed over 170,000 claims. This total includes approximately 50,000 claims by the United States. This large number of federal claims is simply a product of the many federal reservations existing within the State where about 65% of the total area of the State is owned or administered by federal agencies. Idaho is responding to federal reserved water right claims for the following types of land reservations: (1) a national wildlife refuge, (2) national forests, (3) national recreation areas in two different parts of the state, (4) wild and scenic rivers for six different rivers, (5) three wilderness areas, and (6) pre-statehood and post-statehood reservations of lands on behalf of three different groups of Native Americans.

Idaho is not alone in attempting to deal with a large water rights adjudication. Montana has commenced a statewide adjudication of water rights. *In the Matter of the Adjudication of the Existing Rights to the Use of all the Water, Both Surface and Underground, with all Water Basins in the State of Montana,* Case No. WC-88-1. Arizona has two major separate ongoing water right adjudications involving the Gila River and the Little Colorado River. *In Re: The General Adjudication of all Rights to Use Water in the Gila River System and Source,* Maricopa County Superior Court No. W-1, W-2, W-3 W-4 (Consolidated); *In Re: The General Adjudication of all Rights to Use Water in the Little Colorado River System and Source,* Apache County Superior Court No. 6417. Washington and Oregon also have substantial adjudication efforts. *Washington v. Acquavella,* Yakima County Superior Court No. 77-2-01484-5; *In the Matter of the Determination of the Relative Rights to the Use of the Waters of Klamath River and Its Tributaries Pending Before Oregon Water Resources Department.* As with Idaho's adjudication, the federal government is the major claimant in each of these adjudications and is pressing to expand the reserved water rights of the United States.[7]

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[7] The Colorado Supreme Court is the only other state court of last resort that has reviewed the claim for a federal reserved water right under PWR 107. In a superficial analysis, the Colorado Supreme Court also concluded that PWR 107 created a federal reserved water right. *United States v. City and County of Denver,* 656 P.2d 1, 32 (Colo. 1983). In this case, the Idaho Supreme Court followed much of the analysis of the Colorado Supreme Court.

While each reservation includes some issues peculiar to the particular reservation, they all turn upon the application of this Court's doctrine. Each is based on an examination of executive or congressional documents to determine whether to imply a reserved water right under the *Winters v. United States* doctrine or as an express reserved water right. Each of the federal reserved water right cases pending in Idaho District Court present the issue of the materiality of statements made near the time of the creation of the individual reservation or the addition of statutory authority for later executive withdrawal.

In addressing all federal reserved water right cases, this Court has focused in its decision on the language of the relevant statute or reserving document and on documents contemporaneous with the creation of the particular reservation. *United States v. New Mexico*, 438 U.S. at 707-708; *Cappaert v. United States*, 426 U.S. 128, 132 (1976). The Idaho Supreme Court's decision proceeds in a completely new direction. It ignores the express language of the SRHA and the most probative contemporaneous document, the decision of the Assistant Secretary of Interior in *State of Utah*. Instead, the Idaho Supreme Court focuses on water allegedly needed as a result of legislation enacted many years after the statutory authority for the creation of the public water reserves.

Absent some clarification by this Court, state courts in Idaho and throughout the West will struggle with how to apply the federal reserved water rights doctrine. If the Idaho Supreme Court is correct, then lower courts and the parties need to refocus their presentation of evidence about the existence of a federal reserved water right on more current needs of the individual federal reservations.

If, on the other hand, the State of Idaho is correct, then the existence of the federal reserved water right will turn on an examination of documents contemporaneous with the creation of the reservation. Clarification is needed on this issue to provide guidance to the Idaho Court as well as the courts of other Western states.

CONCLUSION

The State of Idaho respectfully requests that the petition for a writ of certiorari be granted. In the alternative, the State of Idaho requests this Court to summarily reverse the Idaho Supreme Court's decision for further consideration in light of *United States v. New Mexico*, 438 U.S. 696 (1978).

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF IDAHO
Docket No. 23587

IN THE MATTER OF SRBA CASE NO. 39576 BASIN-WIDE ISSUE #9 (PWR 107) ENTERED DECEMBER 9, 1996.	Twin Falls, Nov. 1997 Term
UNITED STATES OF AMERICA, Appellant, v. STATE OF IDAHO; J. R. SIMPLOT CO.; LEMHI IRRIGATION CO.; DAVE NELSON, LOLA COATES, SAN FELIPE RANCH; HARRY R. BASS; TED S. BLACKSTOCK; RICHARD BRANDAU; WILLIAM J. BROCKMAN; MICHAEL F. HANLEY, IV; JERRY L. HOAGLAND; THOMAS BALLMAN HOOK; TIM LOWRY; BILL LOWRY; PAUL NETTLETON; R. J. SMITH; WILEY F. SMITH; MITCHELL D. SORENSON; ROBERT THOMAS; YOUNG HARVEY WALKER, Respondents.	1998 Opinion No. 41 Filed: April 6, 1998 Frederick C. Lyon, Clerk

Appeal from the District court of the Fifth Judicial District, State of Idaho. Hon. Daniel C. Hurlbutt, District Judge.

Adjudication order denying a claim by the United States that it holds a reservation of water rights on federal land for stockwatering purposes, *reversed*.

Betty Richardson, United States Attorney, Boise; William B. Lazarus, Department of Justice, Washington, D.C.; Randall J. Bramer, Department of Justice, for appellant United States of America. William B. Lazarus argued.

Hon. Alan C. Lance, Idaho Attorney General; Clive Strong, Deputy Attorney General; David J. Barber, Deputy Attorney General, Boise, for respondent State of Idaho. David J. Barber argued.

Terry T. Uhling and Shawn D. Ysursa, Boise, for respondent J.R. Simplot, Co. Shawn D. Ysursa argued.

WALTERS, Justice

This appeal raises a question of federal law within the Snake River Basin Adjudication (SRBA), a suit in the district court for the general adjudication of water rights in the Snake River water basin. The dispute in the instant action concerns a claim by the United States that it has a federal reserved water right for all springs and waterholes which are located on lands withdrawn from the public domain. The claim is predicated upon an executive order issued in 1926, entitled Public Water Reserve No. 107 (PWR 107). The SRBA court held that PWR 107 did not create a valid basis for a federal reserved water right, and the United States has appealed. We conclude that PWR 107 provides a valid reservation of water rights by

the federal government for the limited purpose of stock-watering by permittees under the Taylor Grazing Act and, accordingly, reverse the order of the SRBA court.

I.

FACTS AND PROCEDURAL BACKGROUND

The United States filed over 11,000 claims in the SRBA asserting a reserved water right pertaining to PWR 107. On November 5, 1995, one of the parties to the adjudication filed a motion to designate the alleged reserved right under PWR 107 as a basin-wide issue. On March 8, 1996, the SRBA district court entered an order granting the motion. The order designated the question: "Whether Public Water Reserve 107 is a valid basis for a federal reserved water right?" as Basin Wide Issue No. 9.

Following briefing and argument, the SRBA court entered its decision and order on December 9, 1996. The court determined that PWR 107 was issued to prevent the control of adjacent land through monopolization of water sources by individual homesteaders who are allowed to settle on the public domain. The court further held that the purpose of PWR 107 was to reserve the land immediately surrounding springs and waterholes to ensure that water would remain available for public use and appropriation, but that PWR 107 did not expressly or impliedly reserve water or appropriate water for use by the United States. In addition, the SRBA court essentially concluded that if there was an implied reservation of the right to water in order to carry out the purposes of PWR 107, that right no longer existed as a result of the enactment by Congress in 1976 of the Federal Land Policy and

Management Act (FLPMA). Therefore, the SRBA court concluded that PWR 107 was not a valid basis for a federal reserved water right in the SRBA. The decision was certified as final under Idaho Rule of Civil Procedure 54(b), allowing the United States to pursue this appeal.

II.

PWR 107 AS A BASIS FOR A FEDERAL RESERVED WATER RIGHT.

A. Federal Reserved Water Rights in General.

The federal reserved water rights doctrine arises from the decision of the United States Supreme Court decision in *Winters v. United States*, 207 U.S. 564 (1908). In *Winters*, the Court held that when Congress established an Indian reservation, it also, by implication, reserved the water rights necessary to achieve the reservation's purpose. In a later case, the Court explained:

> [W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian

> reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

Cappaert v. United States, 426 U.S. 128, 138 (1976). The doctrine of reserved water rights has been extended to include public lands reserved for a particular governmental purpose, such as the creation of parks, wildlife refuges, and national forests.

The reserved right is not without limitation, however. The Court in *Cappaert* also advised that "[t]he implied-reservation-of-water-rights doctrine . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert*, 426 U.S. at 141 (citing *Arizona v. California*, 373 U.S. 546, 600-01 (1963)). Furthermore, if "water is only valuable for [sic] secondary use of the reservation . . . there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator." *United States v. New Mexico*, 438 U.S. 696, 702 (1978). The necessity of water must be so great that without the water the reservation would be "entirely defeated." *Id.* at 700. Therefore, where a reservation of public land for a particular purpose does not expressly declare that water is needed as a primary use to accomplish the purpose of the reservation, or the exact purpose of the reservation is not clearly set forth in terms readily demonstrating the necessity for the use of water, the courts must consider the relevant acts, enabling legislation and history surrounding the particular reservation under review to determine if a federal reserved water right exists.

B. Public Water Reserve 107.

We thus turn to an examination of PWR 107, together with its enabling legislation and the circumstances and history surrounding its creation, to determine whether a federal reserved water right exists in the present case. In 1926, President Calvin Coolidge signed the executive order entitled "Public Water Reserve No. 107." PWR 107 provides:

> [I]t is hereby ordered that every smallest legal subdivision of public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land, be and the same is hereby withdrawn from settlement, location, sale or entry, and reserved for public use in accordance with the provisions of Section 10 of the Act of December 29, 1916.

The authority for withdrawals under PWR 107 is provided in the December 29, 1916, statute known as the Stock Raising Homestead Act (SRHA) and in the Pickett Act of 1910.[1] The first piece of enabling legislation for PWR 107 was the withdrawal provision of the Pickett Act, which was incorporated by reference in the SRHA of 1916. The Pickett Act, 43 U.S.C. § 141, provided:

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[1] Sections 300 and 141 of the SRHA and the Pickett Act, respectively, were repealed by the Federal Land [sic] Management Act (FLPMA), Pub.L. 94-579, 905 [sic] Stat. 2744 [sic] (1976) (codified at 43 U.S.C. §§ 1701 *et seq.* (1986)). However, the FLPMA provided that all withdrawals in force on the date of enactment of FLPMA shall remain in force until specifically changed in accordance with FLPMA.

> [T]he President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including the District of Alaska, and reserve the same for waterpower sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

In short, the Pickett Act of 1910 provided the President with the broad discretion to temporarily withdraw lands and reserve such lands for public purposes. Subsequently, Congress enacted the SRHA of 1916, which authorized the President to reserve lands containing waterholes or other bodies of water needed or used by the public for watering purposes, and delegated the management of such lands to the Secretary of the Interior. Section 10 of the SRHA of 1916, 43 U.S.C. § 300, states:

> [L]ands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but may be reserved under the provisions of [the Pickett] Act of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe.

The Committee Report on the SRHA of 1916 noted:

> This is a new section and authorizes the Secretary of the Interior to withdraw from entry and hold open for the general use of the public,

> important water holes, springs, and other bodies of water that are necessary for large surrounding tracts of country, so that *a person cannot monopolize or control a large territory by locating as a homestead the only available water supply for stock in that vicinity.* [Emphasis in original.]

H.R.Rep. No. 35, 64th Cong., 1st Sess. 18 (1916), *quoted in United States v. City and County of Denver*, 656 P.2d 1, 31 n. 48 (Colo.1982).

Following adoption of the SRHA of 1916, the Secretary of the Interior prepared PWR 107 as a proposed executive order for the President. The order was transmitted to President Coolidge by the Secretary on April 17, 1926, together with a letter stressing to the President the need to prevent the monopolization of public grazing lands by private individuals controlling the water. The Secretary's letter recited:

> The control of water in the semi-arid regions of the west means the control of the surrounding grazing areas, possibly in some regions millions of acres, and in view of the pending bill to authorize the leasing of grazing lands upon the unreserved public domain, it is believed important to retain the title to and supervision of such spring and water holes on the unreserved public domain as have not already been appropriated.[2] [Footnote added.]

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[2] The Secretary's acknowledgement of pending legislation which would allow grazing leases on unreserved land in the public domain was in reference to what later became known as the Taylor Grazing Act. 43 U.S.C. §§ 315 *et seq.* (1934).

On the same day, April 17, 1926, President Coolidge issued PWR 107 withdrawing all unreserved public land containing a spring or waterhole as stated.

After considering the plain and ordinary words of the enabling statutes and executive order underlying PWR 107, we conclude that PWR 107 evidences an express intention by Congress that reserves a water right in the United States.

C. Nature of Reserved Right

In the present case, the United States has limited its claim for a reserved water right to stock water consumption. The United States asserts that the purpose of PWR 107 is to reserve water for public use and appropriation as a source for permittees under the Taylor Grazing Act. The United States persuasively argues that such a reservation of stock water is needed in order to ensure the perpetual use of the water for stockwatering purposes by whichever member of the public happens at any time to have the grazing permit for the lands containing the relevant springs and waterholes. The United States further points out that if the water is available for private appropriation, then individuals could monopolize the water rights for their permanent, exclusive use, thereby precluding stockwatering access to those holding grazing permits for those lands.

We agree with the United States and the observation by the Colorado Supreme Court that the purpose of PWR 107 includes a federal reserved water right and that the United States has the right to administer those water rights. Both the legislative history surrounding the SRHA

of 1916 and the SRHA itself provided the Department of the Interior with the "authority to regulate public springs and water holes so that no person could monopolize or control vast areas of western land by homesteading the only available water supply." *United States v. City and County of Denver*, 656 P.d [sic] at 31. In addition, the letter from the Secretary of the Interior to the President, which was written in contemplation of the then pending Taylor Grazing Act of 1934, stated that the purpose of PWR 107 was to "retain the title to and supervision of such springs and water holes." These springs and waterholes, which are located on public lands, should be regulated, supervised and administered by the Department of Interior. To hold otherwise would be in contravention of the policy of this state "to secure the maximum use and benefit, and least wasteful use, of its water resources." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960).

The purpose of PWR 107 was to prevent the monopolization by private individuals of springs and waterholes on public lands needed for stockwatering. Without the reserved water right for such springs and waterholes the purpose of PWR 107 would be entirely defeated because Taylor Grazing permittees would not have water needed for stockwatering purposes. Furthermore, the administration of the reserved water rights for consumption by grazing animals on land managed by the federal government may simplify the SRBA proceeding because the priority date for all of the Taylor Grazing rights would be the same date, April 17, 1926, which is the date of withdrawal pursuant to PWR 107.

D. The Effect of FLPMA.

The United States argues also that the SRBA district court incorrectly concluded that the purpose of PWR 107 was abrogated by the passage of FLPMA in 1976. The United States contends that, instead, this Court should follow the decision of the Colorado court in *United States v. City and County of Denver, supra*, holding that the enactment of FLPMA had no effect on the reserved water rights created by PWR 107. 656 P.2d at 31, n. 47. We agree.

In 1976, with the enactment of FLPMA, Congress limited the authority for future withdrawals of land from the public domain by the Executive Branch. However, FLPMA provided a savings provision that stipulates: "All withdrawals, reservations, classifications, designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law." 43 U.S.C. historical note § 1701.

In short, the FLPMA itself stipulated that withdrawals and reservations existing at the time of its enactment shall remain in effect. Therefore, PWR 107 reserving water rights in withdrawn land fifty years prior to the enactment of FLPMA, remains in full force and effect.

III.

CONCLUSION

We hold that PWR 107 is a valid basis for a federal reserved water right for the limited purpose of stockwatering. In addition, we conclude that the United States

has the right to administer such water rights on the public lands managed under the Taylor Grazing Act. Furthermore, we conclude that the passage of FLPMA does not affect the PWR 107 withdrawals. Accordingly, the district court's order on Basin-Wide Issue No. 9 is reversed.

No costs are awarded on appeal.

Chief Justice TROUT, and Justices JOHNSON, SILAK and SCHROEDER, **CONCUR**.

APPENDIX B

IN THE DISTRICT COURT OF THE
FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE
COUNTY OF TWIN FALLS

In Re SRBA	)	**Case No. 91-00009**
Case No. 39576	)	
	)	**MEMORANDUM DECISION**
	)	**AND ORDER RE:**
	)	**BASIN-WIDE ISSUE 9**

Daria Zane, United States Department of Justice,
for the United States
David Barber, Deputy Attorney General,
for the State of Idaho
Terry Uhling for J.R. Simplot
Wiley F. Smith, *Pro se*
Jerry L. Hoagland, *Pro se*
Young Harvey Walker, *Pro se*
William J. Brockman, *Pro se*

I. PROCEDURAL HISTORY

Basin-Wide Issue 9 was designated by the court on the motion of Mitchell D. Sorensen and Young Harvey Walker, appearing *pro se* (***Order Designating Basin-Wide Issue No. 9***, Mar. 8, 1996). The issue presented by Basin-Wide Issue 9 is:

> **Whether Public Water Reserve 107 is a valid basis for a federal reserved water right.**

Public Water Reserve (PWR) 107[1] withdraws from entry public lands which surround water sources in order

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[1] Exhibit 19 attached hereto; *see* 43 C.F.R. § 292.1 (1938) (recodified at 29 F.R. 4302 Mar. 31, 1964. Section 292.1 was recodified as 2321.1-1(a)).

to keep homesteaders from controlling large land tracts by settling around the only water supply available for public use.

The position of the United States is that PWR 107 reserves that amount of water necessary to fulfill the purpose of the reservation. The State of Idaho (State), J.R. Simplot, Wiley Smith, Jerry Hoagland, Young Harvey Walker and William J. Brockman (collectively "the Opponents") contend that if PWR 107 reservations exist in Idaho, the reservations are of land and do not expressly or impliedly include water.

II. DECISION

Basin-Wide Issue 9 is resolved by determining whether PWR 107 creates either an express or implied reservation of water for use by the federal government. The first inquiry is whether PWR 107 creates an express reservation of water. To make this determination, the court is required to look at the plain and ordinary words of the enabling legislation and acts of the President creating the PWR 107 reservations. *Cappaert v. United States*, 426 U.S. 128 (1976); *Rim View Trout Company v. Higginson*, 121 Idaho 819, 822, 828 P.2d 848 (1992).

The authority to make PWR 107 reservations was derived from two acts of Congress, the Pickett Act of 1910 and the Stock Raising Homestead Act (SRHA) of 1916. The Pickett Act authorized the President to make withdrawals of land for public purposes as provided in Section One:

> That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale or entry any of the public lands of

> the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by Act of Congress.

Act of June 25, 1910, ch. 421, 36 Stat. 847, codified at 43 U.S.C. § 141 (1976).

Following the Pickett Act's grant of general authority to make land reservations, Congress adopted the SRHA to specifically address withdrawals of land in relation to homesteading. The purpose of the SRHA was to:

> Authorize[s] the Secretary of the Interior to withdraw from entry and hold open for the general use of the public, important water holes, springs, and other bodies of water that are necessary for large surrounding tracts of country; **so that a person can not monopolize or control a large territory by locating as a homestead the only available water supply for stock in that vicinity.**

H.R. Rep. No. 35, 64th Cong., 1st Sess. 18 (1916) (emphasis added).

To implement the general purposes of the SRHA, Section Ten provided:

> That lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but may be reserved under the provisions of the [Pickett] Act of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall, while so

> reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe.

Act of December 29, 1916, 39 Stat. 865, codified at 43 U.S.C. § 141 (1976).

On April 17, 1926 President Calvin Coolidge issued PWR 107 under his authority derived from the Pickett Act and the SRHA:

> [I]t is hereby ordered that every smallest legal subdivision of the public land survey which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of Sec. 10 of the act of December 29, 1916 (39 Stat. 862), and in aid of pending legislation.

Trial Exhibit 19 attached hereto; *see* 43 C.F.R. § 292.1 (1938) (recodified at 29 F.R. 4302 Mar. 31, 1964. Section 292.1 was recodified as 2321.1-1(a)).

The plain and ordinary words of the Pickett Act and the SRHA express the Congressional intent to ensure the implementation of its policy of promoting Western settlement by members of the public. Congress recognized that full settlement of Western lands would be prohibited where one homestead was strategically established to surround a water source of sufficient quantity to be used for the benefit of additional potential homesteads nearby. Such strategically placed homesteads would then be able

to control the water source and prevent homesteading on large areas of land. This occurrence would be contrary to federal settlement policy which sought to maximize Western land use.

PWR 107 was issued to prevent control of water sources by individual homesteaders and subsequent control of adjacent land. Its express purpose was to reserve the land immediately surrounding water sources to ensure that water would remain available for public use and appropriation. PWR 107 was not an express appropriation of water for use by the United States government.[2] The express intention of PWR 107 was to protect the availability of water sources for settlement or homesteading by members of the public who could take public land and put it to private use. Concomitantly, the homesteaders would appropriate the water so protected and place it to private use. In this manner, PWR 107 advanced federal settlement policy. The use of the water in protected sources by the federal government was neither contemplated by Congress nor was it necessary to carry out the express purpose of PWR 107 reservations.

The next inquiry is whether PWR 107 land withdrawals include implied reservations of water for use by the federal government. An implied reservation exits [sic] when water is "needed to accomplish the purpose of the reservation." *United States v. New Mexico*, 438 U.S. 696, 699-700 (1978) (citing *Cappaert v. United States*, 426 U.S. 128 (1976)). The necessity to support a federal reservation

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[2] *See also, United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1980) (PWR 107 does not expressly state an intention to reserve water in public springs or water holes).

must be such that without water the purpose of the land reservation would be "entirely defeated." *Id.* at 700. Federal reservations can only reserve an "amount of water necessary to fulfill the purpose of the reservation, no more." *Id.*

The United States' position is that without a water reservation, it is still possible for an individual to control the entirety of a water supply thereby defeating the purpose of the reservation. This court disagrees. The view that, but for a federal reservation, water on public land may be monopolized assumes no sovereign entity controls or regulates the appropriation of water from that source. This assumption fails because the United States Supreme Court has ruled that the state both controls and regulates that appropriation of all nonnavigable water within its borders.

> **What we hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named,** with the right in each to determine for itself to what extent the rule of appropriation or [sic] common-law rule in respect of riparian rights should obtain. For since 'Congress cannot enforce either rule upon any state,' the full power of choice must remain with the state.

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-164 (1935) (citation omitted) (emphasis added); *see also*, I.C. § 42-101; *California v. United States*,

438 U.S. 696 [sic] (1978); *United States v. New Mexico; Cappaert v. United States.*[3]

The United States' position that PWR 107 impliedly reserves water is contrary to law and would effectively shift control over the appropriation of nonnavigable waters from the state to the federal government. Accepting that PWR 107 impliedly reserved water in addition to expressly reserving land would constitute a complete reallocation of federal and state sovereignty with respect to the appropriation of nonnavigable waters. It would be a feat of legal gymnastics to read the Pickett Act and the SRHA as a Congressional declaration for the federal takeover of state sovereignty over the appropriation of its nonnavigable waters. The practical effect of the United States' position would be to remove water within PWR 107 reserves from appropriation under state law. Water within a PWR 107 reserve would then be allocated by the United States. This has been the position of the Interior Solicitor.

> After the [1926] withdrawal, therefore, a party desiring to use the water either on or off the reservation would be required to obtain permission to do so from the United States through some form of permit. **The permitting process**

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[3] This state's control extends to water sources located on the public domain. *See e.g., Lemmon v. Hardy,* 95 Idaho 778, 780, 519 P.2d 1168 (1974) ("The rule as to trespass and water rights in Idaho appears to be that a water right initiated on the unsurveyed public domain is valid, but a water right initiated by trespass on private property in [sic] invalid."); *Short v. Prasiewater,* [sic] 35 Idaho 691, 208 P.2d [sic] 844 (1922) and *Keiler v. McDonald,* 37 Idaho 573, 218 P. 365 (1923) (Spring water situated wholly on public land is subject to appropriation).

> **allowed the United States to determine that the proposed use was in the public interest and not in derogation of the purpose of the reservation.**

86 Interior Dec. 580, 581 (Dept. of Interior 1979) (emphasis added).[4]

Implicit to the Interior Solicitor's opinion is the erroneous assumption that absent a reservation, the public interest in water sources falling within PWR 107 reservations receives no sovereign protection. This assumption is contrary to well-established law. The Idaho Supreme Court explicitly set forth the state's duty to oversee the public interest in water rights:

> 'All the water [sic] of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose. . . . ' I.C. § 42-101. This expressed policy of the legislature is in harmony with Idaho Const. art. 15, § 1. Such interest or title is not 'in the proprietary sense, but rather in the sovereign capacity as representative of all the

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[4] The opinion of the Interior Solicitor in 1979 is directly contrary to an opinion rendered by the Assistant Secretary of the Interior in 1916 which was issued contemporaneously with the SRHA. In that opinion, the Assistant Secretary commented that water contained in a land reservation could be appropriated under state law. 45 Pub.Lands Dec. 551, 554 (1916). This statement recognizes traditional western water law in which the states are accorded control of the appropriation of nonnavigable waters.

> people for the purpose of guaranteeing that the common rights of all shall be equally protected and that no one shall be denied his proper use and benefit of this common necessity.'

Poole v. Olaveson, 82 Idaho 496, 502, 356 P.2d 61 (1960) (citations omitted); *see also*, I.C. § 42-101.

The "public interest" is a broad concept encompassing a wide range of concerns. As identified by the Idaho Supreme Court one such concern is the recognition by the State of Idaho that water is a "common necessity" which needs to be protected for all people. In other words, the State of Idaho has acknowledged the importance of preventing the monopolization of water. Therefore, as to private rights to the use of water, it is the state, not the federal government, that determines whether or not a particular use serves the public interest. To find otherwise would create dual systems for the appropriation and management of water and contravene the long-established and well-settled law governing the appropriation of nonnavigable waters.

In conjunction with the law establishing state plenary control of nonnavigable water sources, the federal government may obtain reserved rights when, and only when, the reservation serves some *federal* purpose. *United States v. New Mexico*, 428 [sic] U.S. at 700. However, implied reservations cannot be found where the reservation is intended to benefit only those individuals operating on the public lands for their own private purpose. Professor Getches makes the clearest statement of this principle:

> Persons using the public lands for private purposes do not exercise reserved water rights and

> must perfect water rights in accordance with applicable state law. Reserved rights can arise only when public land is reserved – withdrawn from entry and dedicated to a specific federal purpose – and may be exercised by private individuals only when they are engaged in activity that fulfills the federal purpose. **Consequently it is necessary to distinguish between those who use "open" public lands for their own purposes and those who function on reserved lands primarily to carry out the federal purposes of the reservation. . . .**
>
> **Ordinarily lessees and permittees use public or Indian lands for their own purposes and must establish their own water rights under state (or tribal) law.**

DAVID H. GETCHES, WATER LAW 326-327 (2nd ed. 1990) (emphasis added).

In this case, the land containing certain water sources was reserved under PWR 107 so that other homesteaders or stockmen could use the water located within the reservation. *See infra,* H.R. Rep. No. 36 [sic], 64th Cong., 1st Sess 18 (1916). Presumably, none of these users would be using the water for any *public* purpose. Rather, those using water located within a PWR 107 reserve would be doing so for their own *private* purpose. The private use of water within a PWR 107 land reserve does not further a specific federal purpose as is typical of reservations where water use itself furthers a defined federal purpose.

Further, it now appears that the purpose of PWR 107 reservations was abrogated by the passage of the Federal Land Policy and Management Act (FLPMA) of 1976, Pub.L. 94-579, 90 Stat. 2743, codified at 43 U.S.C.A. § 1701, *et seq.* (1986). Under FLPMA, Congress declared

that "the public lands be retained in federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest." *Id.* While FLPMA did not repeal reservations or withdrawals that existed prior to its passage (*see*, Savings Provision § 701 of Pub.L. 94-579, found at 43 U.S.C.A. § 1701n.(c) (1986)), its adoption has significance as it relates to the required necessity in order to find an implied reservation of water under PWR 107.

With the passage of FLPMA, Congress repealed nearly all land disposal laws including those relating to homesteading. *See*, 43 U.S.C.A. § 161, *et seq.* (1986), repealed by Pub.L. 94-579, Title VII, § 702, October 21, 1976, 90 Stat. 2787. Consequently, the specific concern with homesteaders strategically homsteading [sic] around water sources thereby monopolizing large tracts of land has vanished and with it the policy issue underlying the United States' claim of necessity for a reservation of water under PWR 107. This opinion is shared by some within the Bureau of Land Management.

> The original intent of Public Water Reserve withdrawals was to protect selected parcels of public land which contained sufficient water to provide for public use. With the passage of FLPMA, laws relating to land disposal have been repealed to the extent it is no longer necessary to protect undeveloped parcels of public land for the above-stated purpose.

Memorandum to State Director from District Manager, Boise District, dated May 13, 1980.[5]

Implied reservations exist only so long as necessary to serve the purpose of the reservation. *See, e.g., In Re Big Horn Adjudication,* 899 P.2d 848, 854 (1995).[6] Where the necessity for the reservation no longer exists, the implied reservation terminates. Implied reservations should not continue for eternity to serve an interest that no longer exists.

In analyzing PWR 107 reserves, both this court and the Colorado Supreme Court rely on the factors set forth in *Cappaert v. United States* and *United States v. New Mexico.* However, the Colorado Supreme Court found that PWR 107 reservations contain an implied reservation of water "minimally" necessary to serve the purpose of the reservation. *United States v. City and County of Denver,* 656 P.2d 1, 32 (Colo. 1980). While agreeing with its analysis, this court respectfully disagrees with the Colorado court's conclusion. The Colorado court determined that the purpose of the reservation was to provide "watering supply for animal and human consumption." *Id.* at 31.

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[5] *See contra,* pre-FLPMA Interior Decision, *Jack A. Medd,* 60 Interior Dec. 83, 96 (Dept. of Interior 1947).

[6] *In Re Big Horn Adjudication* involved a case in which certain Tribes ceded their land to the United States for sale. The Wyoming Supreme Court held as follows: "[T]he reserved water right disappeared because the purpose for which it was recognized no longer pertained. That purpose no longer existed for lands acquired by others after they had been ceded to the United States for disposition. The effect is that the reserved water rights were eliminated as to those tracts." *In Re Big Horn Adjudication,* 899 P.2d at 854.

Such a purpose does not give rise to an implied reservation of water by the federal government for its use. Where water within a reservation is to be used by private individuals for private purposes, those private users must obtain a water right under state law. In light of the private purpose of the use of the water, the Colorado Supreme Court did not consider the effect of the purported reservation of water on the well-established principles of Western water law regarding the states' plenary control over the appropriation of nonnavigable waters. Finally, while the Colorado court discussed FLPMA, it did not consider FLPMA's effect on the necessity of the reservation.

In conclusion, it is held that implied reservations of water were never necessary to serve PWR 107 land withdrawals. The express purpose of a PWR 107 reservation was to prevent the monopolization of land. So long as the United States may reserve land surrounding water sources, the purpose of the reservation is served. The purpose of the reservation is not "entirely defeated" without water. No federal purpose would be served by an implied reservation of water. Consequently, this court does not find an implied reservation.

Consistent with the reasons stated above, the court finds that PWR 107 does not contain either an express or implied reservation of water.[7]

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[7] The Opponents also argue that PWR 107 reservations do not constitute "blanket" withdrawals. With the determination that PWR 107 reservations do not include water, there is no need to address the issue of "blanket" withdrawals.

IT IS SO ORDERED.

DATED December 9, 1996.

/s/ Daniel C. Hurlbutt, Jr.
DANIEL C. HURLBUTT, JR.
Presiding Judge
Snake River Basin Adjudication

Exhibit 19

Public Water Reserve No. 107

[Handwriting Illegible]

ORDER OF WITHDRAWAL

PUBLIC WATER RESERVE NO. 107

Under and pursuant to the provisions of the act of Congress approved June 25, 1910 (36 Stat., 847), entitled "An act to authorize the President of the United States to make withdrawals of public lands in certain cases", as amended by act of Congress approved August 24, 1912 (37 Stat., 497), it is hereby ordered that every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions

of Sec. 10 of the act of December 29, 1916 (39 Stat., 862), and in aid of pending legislation.

(Sgd) CALVIN COOLIDGE
President

April 17, 1926

Two carbons to General Land Office

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER RE: BASIN-WIDE ISSUE 9 was mailed on December 9, 1996, with sufficient first-class postage to the following:

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P. O. Box 44449
Boise, ID 83711-4449

The United States Department of Justice
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724

Idaho Department of Water Resources
P. O. Box 83720
Boise, ID 83720-0098

Court Certificate of Mailing for Basin-Wide Issue 9

/s/ Illegible
Deputy Clerk

APPENDIX C

In the Supreme Court of the State of Idaho

IN THE MATTER OF SRBA CASE NO. 39576 BASIN-WIDE ISSUE #9 (PWR 107) ENTERED DECEMBER 9, 1996.

UNITED STATES OF AMERICA,

Appellant,

v.

STATE OF IDAHO; J.R. SIMPLOT CO.; LEMHI IRRIGATION CO.; DAVE NELSON, LOLA COATES, SAN FELIPE RANCH; HARRY R. BASS; TED S. BLACKSTOCK; RICHARD BRANDAU; WILLIAM J. BROCKMAN; MICHAEL F. HANLEY, IV; JERRY L. HOAGLAND; THOMAS BALLMAN HOOK; TIM LOWRY; BILL LOWRY; PAUL NETTLETON; R.J. SMITH; WILEY F. SMITH; MITCHELL D. SORENSON; ROBERT THOMAS; YOUNG HARVEY WALKER,

Respondents.

AMENDED ORDER DENYING RESPONDENT JERRY HOAGLAND'S PETITION FOR REHEARING

NO. 23587
Ref. No. 98RH-12

Respondent, Jerry Hoagland, having filed a PETITION FOR REHEARING on April 27, 1998 and a supporting BRIEF on May 11, 1998, seeking review of the Opinion of the Supreme Court filed April 6, 1998; therefore, after due consideration,

IT IS HEREBY ORDERED that Respondent, Jerry Hoagland's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 15th day of October, 1998, nunc pro tunc July 29, 1998.

By Order of the Supreme Court

/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Court Judge Daniel C. Hurlbutt